IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 4 of 2005
WITH
CRIMINAL APPEAL No. 1221 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

AND

HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil judge?

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CRIMINAL CONFIRMATION CASE No. 4 of 2005

STATE OF GUJARAT – APPELLANT
Versus
RAMESHBHAI CHANDUBHAI RATHOD - RESPONDENT
(ORIGINAL ACCUSED IN SESSIONS CASE NO. 79 OF 2000)

CRIMINAL APPEAL No. 1221 of 2005

RAMESHBHAI CHANDUBHAI RATHOD - APPELLANT
Versus
STATE OF GUJARAT – RESPONDENT

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Appearance:
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR, FOR THE STATE.
MR US BRAHMBHATT, FOR THE ACCUSED.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 16/02/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Confirmation Case No. 4 of 2005 arises pursuant to submission of proceedings of Sessions Case No. 79 of 2000 made under Section 366(1) of the Code of Criminal Procedure ("the Code", for short) by the learned Additional Sessions Judge, Fast Track Court No 9, Surat, who by his judgment dated July 18, 2005, has sentenced the respondent No. 1 i.e. Rameshbhai Chandubhai Rathod to death for commission of offence punishable under Section 302, whereas Criminal Appeal No. 1221 of 2005, filed under Section 374(2) of the Code, is also directed against the same judgment, by which the appellant therein is convicted for commission of offences punishable under Sections 363, 366, 376, 397 and 302 IPC and sentenced to RI for 7 years and fine of Rs. 500, in default SI for 1 month for commission of offence punishable under Section 363 IPC as well as RI for 10 years and fine of Rs.500, in default SI for 1 month for commission of offence punishable under Section 366 IPC and RI for life and fine of Rs. 1,000/-, in default SI for 2 months, for commission of offence punishable under Section 376 IPC as

well as RI for 7 years for commission of offence punishable under Section 397 IPC and death for commission of offence punishable under Section 302 IPC.

2. In view of law laid down in **Bhupinder Sharma Vs. State of Himachal Pradesh, (2003) 8 SCC 551**, the name of the victim is not referred to in this judgment.

3. The facts emerging from the record of the case are as under:

The complainant i.e. Nareshbhai Thakorebhai Patel is residing in flat No. A/2 of Sanudip Apartment, located on Rander Road of Surat City, with his family. On the Ground Floor of the apartment, he is running a grocery shop as well as a STD PCO Booth. The name of his wife is Ms. Kailashben. Ms. Kailashben gave birth to two children during subsistence of her marriage with the complainant. The eldest is boy named Brijesh who was aged about 16 years at the time of incident. The deceased was student of IVth Standard, in Ankur School, situated near Sardar Circle, Surat, whereas son of the complainant was prosecuting studies in Swaminarayan Gurukul and was staying in hostel of Swaminarayan Temple. The appellant was employed as Watchman of Sanudip

Apartment and was residing with his wife Savita and two children in a room of the apartment which is opposite Sanudip Apartment. The incident took place on December 17, 1999. The complainant with his wife, Ms. Kailashben, went to Udhana at about 8 PM to attend a religious ceremony. After return from Udhana, the complainant did not find the victim. Therefore, he made inquiries about the victim with his relatives. Those staying in the apartment informed the complainant that sometime before his return from Udhana, the deceased was playing racket and shuttlecock, but they were not knowing as to where she had gone. The complainant made extensive search about his daughter of tender age but in vain. At about 2.30 AM on December 18, 1999, he lodged complaint with Rander Police Station, stating that the victim was missing. The information given by the complainant was recorded by Head Constable Ramdas Barko Borde, who was PSO of the Police Station. Head Constable Borde handed over investigation of complaint lodged by the complainant to ASI Mr. Ashokbhai H. Patil. After lodging the complaint, the complainant continued search of the victim. On December 18, 1999, one Mr. Bipinbhai Bhandari, who is a friend of the complainant, came to the house of the complainant and informed the complainant that his old servant, Vishnubhai, had informed him that

he had spotted the appellant taking the deceased with him on his cycle. Mr. Bipinbhai also informed the complainant that he was told by Vishnubhai that he had shouted at the appellant but the appellant had not stopped. On learning these facts, the complainant started search of the appellant, who was employed as Watchman of the apartment. The complainant also informed the police as to what was conveyed to him by his friend Mr. Bipinbhai Bhandari. Extensive search about the victim and the appellant did not yield any result on December 18, 1999. Mr. Chandravadan Naginbhai Patel, who is brother-in-law of the complainant, stayed at the house of complainant in the night of December 18, 1999. In the morning of December 19, 1999, while going home to take a bath, Mr. Chandravadan Patel spotted the appellant sitting in an open space near vegetable market. Mr. Chandravadan asked the appellant as to where the victim was. Thereupon, the appellant informed Mr. Chandravadan that he had raped the victim and killed her. Therefore, Mr. Chandravadan brought the appellant to the house of the complainant. On being asked, the appellant informed the complainant and others, who had collected near the house of the complainant, that he had taken the deceased on December 17, 1999 with him on his bicycle and raped her and as he had feared that she would disclose the

incident to others, he had killed her. Thereupon, the complainant informed the police, who arrived at the house of the complainant within no time. The appellant took the complainant and police to the place of incident where dead body of the deceased was found lying. The complainant, thereupon, lodged First Information Report about rape of his daughter and her murder, against the appellant on December 19, 1999. On the basis of complaint of the complainant, offences were registered against the appellant. The complaint of the complainant was investigated by PI Mr. SA Desai. PI Mr. Desai held inquest on the dead body of the deceased and made arrangements for sending the same to hospital for post-mortem examination. From the place of incident, a broken bottle containing Castor Oil, and a knife, were recovered. The appellant was arrested and pursuant to disclosure statement made by him, the cycle used by him, for carrying the deceased to the place of incident, and school-bag of the deceased, containing gold and silver ornaments, were recovered. Silver and gold ornaments recovered from the school-bag were identified by mother of the deceased as belonging to the deceased. PI Mr. Desai recorded statements of those persons who were supposed to be conversant with the facts of the case. Incriminating articles seized during the course of

investigation were sent to Forensic Science Laboratory (FSL) for analysis. The post-mortem examination of the body of the deceased indicated that the deceased was subjected to rape and was, thereafter, murdered. The appellant, who was arrested, was forwarded to Dr. Meghrekhaben Mehta for Medical Examination. Before Dr. Megrekhaben Mehta, the appellant stated that he had sustained injuries while committing rape and murder. On completion of investigation, the appellant was chargesheeted in the Court of learned Chief Judicial Magistrate, Surat, for commission of offences punishable under Sections 363, 366, 376, 302 and 397 IPC. As the offences punishable under Sections 366, 376, 397, 302 are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Surat for trial, where it was numbered as Sessions Case No. 79 of 2000.

4. The learned Additional Sessions Judge, to whom the case was made over for trial, framed necessary charge against the appellant at Exh. 4. It was read-over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) Mohd. Illiyas Ishaq Mohd. Shaikh as PW 1, at Exh. 8; (ii) Complainant Nareshbhai Thakorebhai Patel as PW 2, at Exh. 22; (iii) Ms. Kailashben i.e. mother of

the victim and wife of complainant Nareshbhai Patel as PW 3, at Exh. 29; (iv) Mr. Chandravadan Naginbhai Patel as PW4, at Exh. 30; (v) Bipinbhai Babubhai Bhandari as PW 4, at Exh. 31; (vi) Shankarbhai Shivprasad Mainali as PW 5, at Exh. 32; (vii) Jagdishbhai Thakorebhai Patel as PW 7, at Exh. 33; (viii) *panch* Surekhaben Sureshbhai Desai as PW 8, at Exh. 34; (ix) Arvindbhai Jagjivandas Patel as PW 9, at Exh. 36; (x) *panch* Naresbhai Keshavbhai Patel as PW 10, at Exh. 37; (xi) *panch* Ashokbhai Jasvantbhai Bhandari as PW 11, at Exh. 43; (xii) *panch* Pravinbhai Madhubhai Patel as PW 12, at Exh. 44; (xiii) *panch* Jayantilal Ishwarlal Shah as PW 13, at Exh. 49; (xiv) *panch* Iswarbhai Ganpatbhai Patel as PW 14, at Exh. 50; (xv) Devendra Kantibhai Patel as PW 15, at Exh. 53; (xvi) Bhaveshbhai Arvindbhai Patel as PW 16, at Exh. 54; (xvii) child-witness Darshanaben Chandravadanbhai Patel as PW 17, at Exh. 71; (xviii) Mr. Hiralkumar Bipinbhai Patel as PW 18, at Exh. 72; (xix) *panch* Kalyanbhai Laxmanbhai Patel as PW 19, at Exh. 73; (xx) *panch* Kishorebhai Bachubhai Patel as PW 20, at Exh. 75; (xxi) *panch* Sandipkumar Vasantbhai Tailor as PW 21, at Exh. 81; (xxii) *panch* Maheshbhai Chotubhai Patel as PW 22, at Exh. 82; (xxiii) *panch* Dipakkumar Parbhubhai Patel as PW 23, at Exh. 86; (xxiv) Vishnu Bahadur Narbahadur Pariyar as PW 24, at Exh. 89; (xxv) Police Constable Arvindbhai

Budhiyabhai Patel as PW 25, at Exh. 90; (xxvi) Head Constable Ramdas Barku Borde as PW 26, at Exh. 94; (xxvii) Circle Inspector Dalpatbhai Dayalbhai Patel as PW 27, at Exh. 99; (xxviii) ASI Ashokbhai Bhilalbhai Patil as PW 28, at Exh. 103; (xxix) PSO Rameshbhai Govindbhai Nikwade as PW 29, at Exh. 104; (xxx) Dr. Meghrekhaben Hasmukhbhai Mehta as PW 30, at Exh. 105; (xxxi) PSI Abdul Rahim Ahmed Shaikh as PW 31, at Exh. 112; (xxxii) Dr. Sanjeevkumar Thakorelal Garasiya as PW 32, at Exh. 114; (xxxiii) Scientific Assistant in Forensic Science Laboratory i.e. Hitesbhai Natvarlal Trivedi as PW 33, at Exh. 116; and (xxxiv) Investigating Officer Mr. Sunderbhai Ambaram Desai as PW 34, at 119.

The prosecution has also produced documentary evidence, such as: (i) post-mortem notes of the deceased-victim, at Exh. 9; (ii) complaint lodged by Nareshbhai against the appellant for committing rape of his daughter and murder of his daughter on December 19, 1999, at Exh. 23; (iii) complaint lodged by Nareshbhai on December 18, 1999 wherein it was mentioned that his daughter was missing, at Exh. 25; (iv) Inquest Report, at Exh. 35; (v) *panchnama* of place of incident and seizure of blue pant put on by the victim, her *chappels*, broken bottle containing Castor Oil, etc., at Exh. 38; (vi) *panchnama*

of seizure of clothes of the appellant, at Exh. 45; (vii) *panchnama* of recovery of cycle belonging to the appellant and find of school-bag belonging to the deceased from where anklets and two gold earrings were recovered, at Exh. 51; (viii) *panchnama* indicating seizure of blood stained earth from the place of incident and blood stained hair-pins, at Exh. 74; (ix) *panchnama* of seizure of clothes of the deceased, at Exh. 83; (x) *panchnama* of recovery of semen by doctor from dry grass found at the place of incident, at Exh. 87; (xi) entry made in the Police Station Diary indicating that the complaint lodged by Nareshbhai on December 18, 1999 was registered, at Exh. 95; (xii) entry from Police Station Diary indicating that the complaint of Nareshbhai against the appellant was registered, at Exh. 97; (xiii) Map of place of incident prepared by Circle Inspector Mr Patel, at Exh. 102; (xiv) Medico-legal case papers of the appellant prepared by Dr. Mehta, at Exh. 107; (xv) Certificate indicating the result after Medical Examination of the appellant, at Exh. 110; (xvi) Report of semen analysed of the appellant, at Exh. 115; and (xvii) Report of Forensic Science Laboratory, at Exh. 129, etc. in support of its case against the appellant.

5. After recording of evidence of prosecution

witnesses was over, the learned Judge of the Trial Court explained to the appellant the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In the further statement, the case of the appellant was that of total denial. However, in answer to last question, he expressed his desire to file his written statement in the case. The learned Additional Sessions Judge granted the permission and accordingly, the appellant filed his written statement at Exh. 133. In his written statement, the appellant mentioned that he was staying with his family, consisting of his wife and two daughters, out of whom one was aged about 10 years. He further said stated he was working as a Watchman in Sanudip Apartment since years and had no enmity with anyone nor any of the occupants had any grievance against him nor any complaint was filed against him. According to him, the deceased, from her tender age, was playing with his daughters and was often coming to his room. It was stated by the appellant in his written statement that the deceased was also playing with other girls of the apartment and no grievance was made that he had committed misconduct with any of the girls. It was asserted by the appellant that after learning that the victim was missing, he had

searched about the victim with others and had also visited house of the complainant where he had dined and that he was present in the flat occupied by the complainant when policemen had come to the flat of the victim in connection with the complaint lodged by the complainant on December 18, 1999. It was mentioned by him that he had always cooperated with the police and others. According to him, he had not made any extra-judicial confession either before the residents of the society or police nor had shown the place where dead body of the deceased was lying nor admitted guilt of the offence before *panch-witnesses* nor was he taken by the police to the place of incident nor had he taken out any article from school-bag of the deceased and the entire evidence was concocted to implicate him falsely in the case. What was asserted by the appellant in his written statement was that he had not taken the deceased to any place on his cycle and that a false case was lodged against him to save skin of close relatives of the complainant. By filing written statement, the appellant emphasised that he was totally innocent. However, it is relevant to notice that no defence evidence was adduced at all by the appellant to substantiate the claims advanced by him in his written statement.

6. After scrutinising the oral and documentary evidence in the case, the learned Additional Sessions Judge noticed that the whole case against the appellant was based on circumstantial evidence. On critical analysis of evidence of (i) Ms. Darshnaben Patel and (ii) Mr. Sandipkumar Tailor, the learned Judge concluded that the deceased was last seen playing badminton with the appellant, in the apartment where the complainant is residing. The learned Judge noticed that testimony of witness Vishnu Bahadur was reliable, as he was not related to any of the relatives of the deceased nor had any animosity with the appellant, but was serving with the Nepal Army and had come to India specially for the purpose of tendering evidence. On critical examination of evidence of (i) Vishnubahadur Narbahadur and (ii) Shankarbhai Mainani, the learned Judge held that the first incriminating circumstance, namely, that the deceased was last seen alive in the company of the appellant near Adajan Patia, Surat, was satisfactorily established. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved beyond reasonable doubt that the appellant had enticed the victim, who was aged 10 years, out of the keeping of her lawful guardian with intent to force her to illicit intercourse and, therefore, commission of offences

punishable under Sections 363 and 366 IPC were established. The learned Judge further held that extra-judicial confession made by the appellant was proved by the reliable testimony of: (i) complainant Nareshbhai, PW 2, examined at Exh. 22; (ii) witness Chandravadan, PW 4, examined at Exh. 30; (iii) Bipinbhai, PW 5, examined at Exh. 31; and (iv) witness Arvindbhai Patel, PW 9, examined at Exh. 36. According to the learned Judge, the evidence of abovereferredto witnesses did not indicate that extra-judicial confession was made by the appellant in presence of police nor it was made by the appellant under coercion or duress. The learned Judge further noticed that the appellant had close relations with family of the deceased and, therefore, taking undue advantage of his position, the appellant had taken the deceased to a secluded place and murdered her after committing rape on her. The learned Judge further concluded that find of bottle containing 5 Mg of Castor Oil exhibited bad intention of the appellant. The learned Judge noticed that the appellant had injuries which could have been sustained by him while committing rape and murder of the deceased and this was also an incriminating circumstance against him. The learned Judge deduced that the case of the prosecution, that the appellant had committed murder of the deceased by means

of knife, was inspiring confidence because the appellant was a Watchman and knife was handy to him. According to the learned Judge, over and above the extra-judicial confession made by the appellant before the witnesses, who had collected in the apartment of the complainant, and the complainant, the appellant had also made extra-judicial confession before Dr. Meghrekhaben in the form of narrating history when he was presented before Dr. Meghrekhaben for Medical Examination, which established involvement of the appellant in rape and murder of the deceased. According to the learned Judge, place of incident was pointed out by the appellant whereas cycle belonging to the appellant and school-bag belonging to the deceased were discovered by the appellant and these circumstances were also incriminating in nature. The learned Judge noticed that, from the school-bag belonging to the deceased, which was discovered by the appellant, silver and gold ornaments were recovered which were identified by mother of the deceased as belonging to the deceased and, therefore, commission of offence punishable under Section 397 IPC was established. The learned Judge noticed medical evidence produced by the prosecution and concluded that homicidal death of the deceased and rape on her were established beyond reasonable doubt. The learned Judge found that the chain of circumstances was

complete and it was proved by the prosecution that in all human probability, rape on and murder of victim was committed by the appellant alone and alone and none else. The learned Judge noticed that the circumstances established were consistent only with the guilt of the appellant and were not consistent with his innocence at all. In view of abovereferredto conclusions, the learned Judge has convicted the appellant for commission of offences punishable under Sections 363, 366, 397, 376, 302 IPC and imposed different punishments enumerated earlier, including that of death sentence *vide* judgment dated May 18, 2005, giving rise to abovenumbered Confirmation Case and Conviction Appeal.

7. Mr. U. S. Brahmaputra, learned Counsel of the appellant, contended that Dr. Shaikh, who had performed autopsy on the dead body of the deceased, has not stated that because of rape committed on the deceased, she had died or the injuries inflicted on her were sufficient in the ordinary course of nature to cause her death and, therefore, unwarranted conviction of the appellant under Section 302 is liable to be set aside. The learned Counsel emphasised that the medical evidence does not point out as to when the death of the deceased had taken place nor the age of injuries is mentioned in the post-

mortem notes and, therefore, the case of the prosecution that after kidnapping the victim on December 17, 1999, she was subjected to rape and thereafter, murdered between 22-00 Hours of December 17, 1999 and 8.00 AM of December 19, 1999, should not have been accepted by the Court. The learned Counsel argued that causing of punctured wounds to the victim is not possible with muddamal knife produced by the Court and as the prosecution has failed to establish as to how punctured wounds were caused to the deceased, the case of the prosecution should have been disbelieved. It was emphasised that nail examination of victim of rape is necessary in a rape case, but as admitted by Dr. Shaikh, he had not carried out examination of nails of the victim and as this lapse has prejudiced the appellant in his defence that he was falsely implicated in the case, the judgment impugned in the appeal should be set aside. The learned Counsel argued that the testimony of Dr. Shaikh makes it very clear that he had conducted post-mortem examination after reading inquest report and as post-mortem report was prepared on the basis of inquest report, the same should not have been acted upon by the Trial Court while deciding guilt or otherwise of the appellant. The learned Counsel referred to the testimony of complainant Nareshbhai in detail and pointed out that

in his testimony, he has stated that extra-judicial confession was made by the appellant before him and others, but in the complaint lodged by him, it is stated that extra-judicial confession was made by the appellant when police was present and in view of this discrepancy in evidence, the Trial Court should not have concluded that it was proved by the prosecution beyond reasonable doubt that the appellant had made extra-judicial confession before complainant Nareshbhai. The learned Counsel pleaded that even at the time of filing information report on December 18, 1999 before police that his daughter was missing, the complainant had neither mentioned description of his daughter nor described the clothes put on by her nor had stated that she was wearing gold / silver ornaments nor raised accusing finger at anyone and as the case of the prosecution against the appellant is based on suspicion, the appeal should be allowed. Similarly, after referring to the evidence of Chandravadan Patel, it was argued that it was claimed by the said witness that the appellant had made extra-judicial confession before him but the so-called confession was not referred to at all by the witness in his police statement and, therefore, the claim advanced by him that the appellant had made extra-judicial confession before him should have been

disbelieved by the Court. The learned Counsel referred to the testimony of witness Bipinbhai Bhandari in detail and argued that his claim that witness Vishnu had informed him that he had seen the appellant with victim on cycle and though he had called out name of the appellant, the appellant had not stopped was doubtful inasmuch as so-called statement was made by witness Vishnubhai before witness Shankar and not before this witness. The learned Counsel argued that the conduct of the appellant was innocuous as well as innocent inasmuch as he was also searching the missing victim but was roped in on suspicion and, therefore, he is entitled to be acquitted. The learned Counsel asserted that the main circumstance relied upon by the prosecution that the deceased was last seen in the company of the appellant is not satisfactorily proved at all and, therefore, the appellant should be acquitted. Elaborating this argument, it was contended that the only witness examined by the prosecution to prove that the deceased was last seen alive in the company of the appellant is witness Vishnubhai, but Vishnubhai's presence at the place of his business was highly doubtful inasmuch as he has deposed that there was no *larry* surrounding his *larry* whereas Investigation Officer has admitted in his testimony that there were 3 to 4 *larries* near the *larry* kept by

Vishnubhai and in view of this discrepancy, the evidence of witness Vishnubhai should not have been acted upon. The learned Counsel further pointed out that it is claimed by witness Vishnubhai that though he had spotted the appellant going with the deceased on his cycle but it is proved that he had not informed those persons who were working on his *larry* and as this conduct is not natural, witness Vishnubhai should not have been believed by the Court for the purpose of coming to the conclusion that incriminating circumstance, namely, that the deceased was last seen alive in the company of the appellant was established. According to the learned Counsel of the appellant, the Investigating Officer had neither recorded statements of those persons who were working on the *larry* of witness Vishnubhai nor recorded statements of those *larrywalas*, who were doing business near the *larry* of witness Vishnubhai and as investigation is not fair, the appellant could not have been saddled with liability for commission of major offences. The learned Counsel emphasised that the testimony of Investigating Officer indicates that there were no marks of tyres of cycle at the place of incident and, therefore, the case of witness Visnubhai that he had seen the appellant carrying the victim on carrier of the cycle should not have been believed by the Court. The learned Counsel argued that a

bare perusal of the testimony of Investigating Officer makes it evident that four places were described by him as place of incident i.e. Bhulka Bhavan, Bhulka Vihar School, New Bhulka Vihar School and Pal *Jakat-Naka* and as prosecution is not sure as to where the incident had taken place, the appellant deserves to be acquitted. According to the learned Counsel, the so-called extra-judicial confession made by the appellant before complainant Nareshbhai as well as witness Chandravadan and witness Bipinbhai are not satisfactorily proved at all and even if the Court comes to the conclusion that so-called extra-judicial confession made by the appellant was made by the appellant before abovenamed witnesses, there is no manner of doubt that at that time, police was present and as extra-judicial confession sought to be proved by the prosecution is hit by the provisions of Section 25 of the Evidence Act, the same deserves to be excluded from consideration while determining the guilt of the appellant. It was argued that neither the inquest report produced by the prosecution at Exh. 35 nor the *panchnama* of place of incident produced by the prosecution at Exh. 38 nor the *panchnama* indicating seizure of clothes put on by the appellant produced by the prosecution at Exh. 51 nor *panchnama* indicating recovery of gold and silver ornaments of the deceased can

be regarded as *panchnamas* under Section 27 of the Evidence Act and, therefore, the contents of those *panchnamas* which are in substance statements before the police should not have been acted upon by the learned Judge of the Trial Court at all. The learned Counsel emphasised that Dr. Meghrekhaben in her examination-in-chief has stated that extra-judicial confession was made by the appellant, which was reflected by her in medical papers of the appellants but she has in terms admitted in her cross-examination that at the time when history was stated by the appellant, the Police Officer was present and as so-called extra-judicial confession made by the appellant before Dr. Meghrekhaben is also hit by provisions of Section 25 of the Evidence Act, the same could not have been relied upon by the learned Judge. It was argued that according to witness Bipinbhai, the police had picked-up articles such as knife, bottle containing oil, pant put on by the victim, etc. which, in turn, establishes that no *panchnama* was drawn by the police while seizing those articles and, therefore, the prosecution case that near the dead body of the victim, abovereferredto articles were found lying should have been disbelieved by the Trial Court. According to the learned Counsel of the appellant, the report of Forensic Science Laboratory does not connect the appellant with

crime in question and, therefore, the report is of no assistance to the prosecution to prove charges levelled against the appellant. The learned Counsel asserted that chain of circumstances is not complete so as to rule out innocence of the appellant and as prosecution has failed to prove beyond reasonable doubt that it was the appellant and appellant alone and none other who had kidnapped the victim and, thereafter, committed rape on her and murdered her, the appellant should be acquitted. It was contended that the learned Judge of the Trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, unwarranted conviction of the appellant should be set aside by allowing the appeal.

In the alternative, it was argued that the case of the prosecution against the appellant is based on circumstantial evidence and, therefore, the appellant should not have been sentenced to death. The learned Counsel argued that testing the case on the touch-stone of the guidelines laid-down in **Bachan Singh Vs. State of Punjab, (1980) 2 SCC 684** and **Machhi Singh Vs. State of Punjab, (1983) 3 SCC 470** and balancing the aggravating and mitigating circumstances emerging from the evidence on record, the case cannot be appropriately called one of

the rarest of rare cases so as to warrant imposition of death sentence on the appellant. It was argued that the appellant cannot be said to be such a dangerous person that to spare his life will endanger the community nor can it be held that the circumstances of the crime were such that there is no alternative but to impose death sentence even after recording maximum weightage to the mitigating circumstances in favour of the appellant and, therefore, the death sentence should be commuted to one punishable with imprisonment for life.

8. Mr. K. T. Dave, learned Additional Public Prosecutor for the State, argued that it is true that the case of the prosecution against the appellant is based on circumstantial evidence but asserted that circumstances sought to be relied upon are firmly proved by the prosecution and, therefore, the well founded conviction of the appellant should be confirmed by this Court. According to the learned Additional Public Prosecutor, the first circumstance sought to be relied upon by the prosecution is that the deceased who was aged about 10 years was residing with her parents in Flat No. A/2 of Sanudip Apartment located on Rander Road at Surat and this circumstance amply stands proved by the reliable

testimony of complainant Naresbhai examined at Exh. 22 and his wife, Ms. Kailashben examined at Exh. 29. The learned Counsel argued that the second circumstance which is sought to be relied upon the prosecution is that the appellant was serving as a Watchman since long and was residing along with his wife and children in a room situated on the Ground Floor of Happy Home Apartment which is opposite Sanudip Apartment, Surat and as the appellant had won the confidence of the victim, he was able to induce the deceased to go with him and this circumstance also stands proved by reliable testimony of complainant Nareshbhai recorded at Exh. 22 and that of his wife Kailashben recorded at Exh. 29. The learned Additional Public Prosecutor pointed out that yet another circumstance sought to be proved by the prosecution against the appellant is that on December 17, 1999 between 8.45 PM and 9.00 PM, the deceased was playing badminton with witness Darshanaben and thereafter, was found playing badminton with the appellant and that this circumstance stands proved beyond reasonable doubt by the testimony of witness Darshanaben recorded at Exh. 71 and witness Sandipkumar recorded at Exh. 81. According to the learned Additional Public Prosecutor, the circumstance, namely, that when the parents of the victim returned home after attending religious ceremony at

Udhana on December 17, 1999, they found that their daughter was missing and that at about 2.30 AM on December 18, 1999, the complainant lodged complaint informing the police that his daughter was missing stands amply proved by the testimony of witness Nareshbhai recorded at Exh. 22 and PSO of Police Station Ramdas, recorded at Exh. 94. It was argued that on December 17, 1999, witness Vishnu Bahadur had seen the appellant going on his cycle with the victim who was sitting on carrier between 9.00 PM and 9.30 PM stands proved by the reliable testimony of witness Vishnubhai and, therefore, the incriminating circumstance that the deceased was last seen alive in the company of the appellants stands fully established. The learned Counsel emphasised that witness Vishnubhai was knowing the appellant as well as the deceased because earlier, he was residing in Sanudip Apartment, located at Rander Road, Surat and, therefore, there was no possibility of mis-identifying the appellant as the person who was taking the victim with him during the night hours of December 17, 1999. The learned Counsel pointed that on the night of December 18, 1999 between 2.00 AM and 3.00 AM, the appellant had conveyed to witness Devendrabhai, who is examined at Exh. 53 as well as witness Bhaveshbhai, who is examined at Exh. 54 that he was also searching the victim and had misled one

and all, and this fact stands proved by reliable evidence tendered by those two witnesses. According to the learned Additional Public Prosecutor for the State, on December 18, 1999, Vishnu Bahadur had gone to Sanudip Apartment at about 1.00 PM to 1.30 PM to meet his former colleague Shankarbhai and on seeing many people having gathered there, he had made enquiry with Shankarbhai as to why people had gathered whereupon Shankarbhai had conveyed to him that the victim was missing since last night and thereupon Vishnubhai had conveyed Shankarbhai that he had seen the accused going with the victim on cycle last night between 9.00 PM and 9.30 PM and this very important fact stands amply proved by the reliable testimony of witness Vishnubhai as well as that of witness Shankarbhai, who is examined at Exh. 32 and testimony of witness complainant, etc. According to the learned Counsel of the State, the learned Judge of the Trial Court who had advantage of observing demeanour of the witnesses was justified in concluding that the incriminating circumstance that the deceased was last seen alive in the company of the appellant stands fully established and the said finding should be upheld by this Court. It was further argued by the learned Additional Public Prosecutor for the State that on relevant information being conveyed by witness Vishnubhai to

witness Shankarbhai and others that he had seen the accused going on cycle with the deceased in the night of December 17, 1999 between 9.00 PM and 9.30 PM, the search was made about the appellant, but the appellant was found missing and this incriminating circumstance stands proved by the testimony of witness Bipinbhai and witness Arvindbhai as well as witness Naresbhai. According to the learned Counsel, this incriminating circumstance is not explained by the appellant at all which deserves to be pondered over. The learned Counsel for the State maintained that the fact that in the early morning of December 19, 1999, witness Chandravadan, who was going home, had spotted the appellant sitting at an open place near Bhulka Bhawan School and approached him and that the appellant had made extra-judicial confession before him stands proved by the testimony of witness Chandravadan examined at Exh. 30 and, therefore, the involvement of the appellant with the gruesome incident in question can hardly be doubted. What was asserted by the learned Counsel for the State Government was that as per evidence tendered by witness Bipinbhai, which is recorded at Exh. 31, when the appellant was brought to the house of the complainant, he had made extra-judicial confession before him as well as the complainant and others and as this assertion made on oath is not challenged in his cross-

examination at all, the case of the prosecution that the appellant had made extra-judicial confession about his guilt deserves to be accepted by this Court. It was argued that the evidence on record clinchingly establishes that the appellant had shown the place of offence as well as the place where dead body of the deceased was lying and this circumstance also connects the appellant with crime in question. It was emphasised by the learned Additional Public Prosecutor for the State that post-mortem notes prepared by Dr. Shaikh establishes that the deceased died a homicidal death as well as that she was subjected to rape and, therefore, the comments offered by the learned Counsel of the appellant on the testimony of Dr. Shaikh should not be accepted by the Court. According to the learned Additional Public Prosecutor, when the appellant was arrested at about 2.30 PM on December 19, 1999, it was found that he had sustained minor injuries on both his hands at elbow and both his legs at knee which also makes clear that while committing rape, the appellant had sustained those injuries and, therefore, conviction of the appellant cannot be regarded as erroneous. It was argued that as per the report of FSL, human blood was found on the T-shirt of the appellant but no explanation is offered by the appellant in his further statement as to how human

blood was found on his T-shirt though it is established that he had not sustained any bleeding injury and this circumstance should also be taken into consideration by the Court while deciding the question whether chain of circumstances proved against the appellant is complete. The learned Counsel emphasised that a bare denial made by the appellant in his further statement recorded under Section 313 of the Code also is an additional link in the chain of circumstances established by the prosecution and should be taken into consideration by the Court. It was emphasised that a false plea was taken by the appellant in his written statement that in order to save close relatives, a false case was foisted upon by the prosecution upon the appellant and taking up a false plea should also be treated as and additional link in the chain of circumstances established by the prosecution. The learned Counsel of the State asserted that the circumstance established by the prosecution prove that it was the appellant and appellant alone, who had kidnapped the victim and killed her after committing rape of her and, therefore, the judgment impugned in the appeal should be confirmed by the Court. It was argued that cogent and convincing reasons have been given by the learned Judge for convicting the appellant under Section 363, 366, 376, 302 and 397 IPC and as the learned Counsel

of the appellant has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

As far as death sentence imposed on the appellant is concerned, the learned Counsel argued that in recent years, the rising crime rate particularly violent crimes against women and girls of tender age has made the criminal sentencing by the Court a subject of concern and, therefore, the death sentence imposed on the appellant cannot be regarded as unwarranted or harsh as pleaded by the learned Counsel of the appellant. According to the learned Additional Public Prosecutor for the State, this sordid episode of the appellant, a Security Guard, whose sacred duty was to ensure the protection of the welfare of the inhabitants of the flats in the apartment, makes the crime even more heinous, when to gratify his lust, he had committed rape on the victim and murdered her and, therefore, the death sentence imposed on the appellant should be upheld by the Court. It was maintained by the learned Additional Public Prosecutor that having regard to the peculiar facts and circumstances of the case, the learned Judge of the Trial Court was justified in treating this case as the rarest of rare and imposing death sentence on the appellant, as

a result of which, prayer made by the learned Counsel of the appellant to commute the sentence, should not be considered favourably by the Court. What was asserted was that while considering the question whether death sentence imposed on the appellant is proper or not, the Court should take into consideration deterrent and retributive theories of punishment and uphold the death sentence imposed on the appellant.

9. This Court has heard Mr. U. S. Brahmaputra, learned Counsel of the appellant and Mr. K. T. Dave, learned Additional Public Prosecutor for the State, at length and in great detail at least for four days. The evidence on record has been read and re-read by the learned Counsels of the parties. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

10. This is a case based on circumstantial evidence. It is not the case of the prosecution that kidnapping of the victim by the appellant or rape on the victim by the appellant or her murder by the appellant was witnessed by anyone. No direct evidence is tendered to establish the

charges levelled against the appellant. As the whole case is based on circumstantial evidence, it would be advantageous to refer to the law relating to circumstantial evidence.

11.1 The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances can not fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude

every hypothesis except the one sought to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, howsoever,

extravagant and fanciful it might be. In **Sharad v. State of Maharashtra, A.I.R. 1984 SC 1622**, after referring to earlier case law, the Supreme Court has summarized the conditions to be fulfilled in a case based on circumstantial evidence as under: (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established, (ii) the fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

11.2 If the aforesaid various conditions

are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case.

12. Having noticed the law, which governs the case based on circumstantial evidence, this Court proposes to consider the question as to whether the circumstances sought to be proved against the appellant are fully established and whether chain of circumstances is complete so as to prove guilt of the appellant and exclude possibility of his innocence.

(i) The first circumstance which is sought to be proved and relied upon by the prosecution is that the deceased was raped and she died a homicidal death. To prove this circumstance, the prosecution has examined Dr. Mohd. Illiyas Ishaq Mohd. Shaikh at Exh. 8. The witness has stated that on December 19, 1999 at about 1.15 PM, Police Constable Arvindbhai, having Buckle No. 2965 of Rander Police Station, had brought dead body of the deceased for post-mortem examination. According to him, the post-mortem examination was conducted by a panel consisting of three doctors and over and above him, Dr. K. R. Pensuria and Dr. S. S. Agrawal had also conducted post-mortem of the deceased. The witness has stated that the post-mortem examination on the dead body of the deceased was commenced at 1.20 PM and completed at 3.00 PM. According to this witness, on post-mortem examination, he had found following injuries:

"15. Diffuse swelling of both labia majora, contusions are linear aspect of both majora, contusions are labia minora reddish blue in colour present. Vertical, linear abrasion present over lower aspect of (R) labia majora, 2 x 0.2 cm size, reddish in colour. Hymen ruptured in lower aspect, circular 1 cm in diameter, inflamed margins & surrounding blood stains.

17. External injuries:

(i) Incised wound present at root of the nose, transverse, 1 x 0.2 cm size x bone deep; dried blood present in the wound;

(ii) Incised wound present 0.5 cm below outer angle of right eye, transverse 0.8 x 0.1 cm x muscle deep with dried blood present in it;

(iii) Five puncture wounds present on anterior aspect of abdomen, 0.1 cm diameter, 3 on left & 2 on right side of midline, muscle deep;

(iv) Linear, scratch abrasion, reddish in colour transverse, present on left side of abdomen, 6 cm left of umbilicus 4 cm x 0.1 cm size;

(v) Incised wound present over left suprapubic region, 10 cm below umbilicus, oblique, 0.4 x 0.2 cm x muscle deep;

(vi) Multiple linear scratch abrasions, vertical, present on medial aspect of right knee, length varying from 3-3.5 cm, 0.1 cm width, each 0.5 cm apart, reddish in colour;

(vii) Incised wound present over back of abdomen, in midline 71 cm above (R) heel, oblique 0.6 x 0.4 cm x muscle deep with dried blood stains in it;

(viii) Multiple incised wounds present on back of abdomen on right side, 3 in number, 1 x 0.5 cm x muscle deep size, upper one 76 cm, middle one 73 cm & lower one 66 cm above right heel, with dried blood stains present in them.

(ix) Incised wound present on outer aspect of left genital region, 60 cm above (L) heel, oblique, 1 x 0.7 cm x muscle deep.

(x) Incised wound present on outer aspect of middle third of left thigh, vertical, 43.5 cm above (L) heel, 1 x 0.8 cm x muscle deep with dried blood stains in it.

All above injuries are clear cut, with acute angles and ante-mortem in nature.

19. Head:

(1) No evidence on injury.
(2) No evidence of fracture.
(3) Meninges intact. Brain congested. Wt. 800 Gms."

The testimony of Dr. Shaikh makes it very clear that the deceased died because of neurogenic shock. As per the cause of death mentioned in post-mortem notes, there is no manner of doubt that the deceased died because of shock as a result of sexual intercourse and multiple injuries sustained by her. It is nobody's case that small girl aged 10 years had inflicted injuries to herself, which were found by Dr. Shaikh while performing post-mortem nor it is the case of anyone that those injuries were accidental. The fact that rape was

committed on the deceased stands amply proved by testimony of Medical Officer examined at Exh. 8. The finding recorded by the learned Judge of the Trial Court that it is proved by the prosecution beyond reasonable doubt that the victim who was of tender age was subjected to rape and, thereafter, killed is found to be eminently just and is hereby upheld.

(ii) The second circumstance which is sought to be relied upon by the prosecution is that the deceased victim who was aged about 10 years was residing with her parents in Flat No. A/2 of Sanudip Apartment located on Rander Road of Surat City. To prove this circumstance, the prosecution has examined the father of the victim i.e. Nareshbhai at Exh. 22 and mother of the victim i.e. Ms. Kailashben at Exh. 29. Both the witnesses have categorically stated that the deceased was their daughter and was residing with them in Flat No. A/2 of Sanudip Apartment, Rander Road, Surat. This fact is not disputed by the appellant at all and, therefore, this Court comes to the conclusion that the second circumstance sought to be relied upon by the prosecution, namely, that the deceased victim who was aged about 10 years was residing with her parents in Flat No. A/2 of Rander Apartment

located on Rander Road Surat stands fully established by the prosecution.

(iii) The third circumstance which is sought to be proved by the prosecution is that the appellant was serving as a Watchman since long and he was residing with his family in a room located on Ground Floor of Happy Home Apartments, situated opposite Sanudip Apartment, Surat. This fact is also established by reliable testimony of witness Nareshbhai and his wife i.e. witness Kailashben who have categorically stated that the accused was serving as Watchman of Sanudip Apartment and that he was residing in a room situated on Ground Floor of Happy Home Apartments, which in turn is located opposite Sanudip Apartment, Surat. The fact that the appellant was employed as Watchman of Sanudip and was staying on the Ground Floor of Happy Home Apartment is not disputed by the appellant at all. Therefore, it will have to be held that the third circumstance which is sought to be relied upon by the prosecution is also satisfactorily established.

(iv) The fourth circumstance which is sought to be relied upon and proved by the prosecution is that the

appellant had won the confidence of the victim, as a result of which the victim had reposed confidence in the appellant. To prove this circumstance, the prosecution has examined witness Kailashben. Witness Kailashben in her testimony recorded at Exh. 29 has stated that the appellant used to take the victim on his cycle and leave her at her school when *rickshawala* failed to turn up to pick up the victim to take her to school. This statement of fact is not challenged by the appellant in gruelling cross-examination of witness Kailashben. Similarly, witness Chandravadan Naginbhai Patel, whose testimony is recorded at Exh. 30 has stated that the appellant used to leave the victim on his cycle at her school when *rickshawala* engaged for this purpose did not turn up. What is relevant to note is that in his written statement filed at Exh. 133, the appellant has admitted that the deceased was playing with his daughters and was coming to his room off and on and that no grievance was made by anyone at any time that he had misbehaved with the deceased. Thus, evidence tendered by abovenamed two witnesses read with the admission made by the appellant makes it very clear that the appellant had won the confidence of the victim and the victim had reposed confidence in him. Therefore, the prosecution case that

the appellant had enticed the victim to come with him and taken with him on bicycle on December 17, 1999 becomes plausible and acceptable.

(v) The fifth circumstance which is sought to be proved by the prosecution is that between 8.45 PM and 9.00 PM on December 17, 1999, the appellant was last seen playing badminton with the deceased in Sanudip Apartment. To prove this circumstance, the prosecution has examined child-witness Darshanaben at Exh. 71 and witness Shankarbhai at Exh. 81. The testimony of child-witness Darshanaben shows that she is residing at Anand Mangal Society, Rander, Surat with her parents. Her testimony shows that at the time of tendering evidence, she was prosecuting studies in VIIIth Standard. Her testimony also makes it evident that complainant Naresbhai is her maternal uncle. According to her, on December 17, 1999, she in the company of her parents had gone to Sanudip Apartment to see her maternal uncle and that between 8.00 PM and 8.30 PM, she was playing badminton with the deceased in the open space opposite STD Shop. According to her, at that time, one Jayanti Dada was sitting near the STD Shop and she had left the place as her mother had called her for dinner. The witness has further mentioned

that when she had left the place she had found that the deceased was playing badminton with Jayanti Dada. It is further mentioned that after having dinner, she had again come back and started playing badminton with the deceased. According to her, after sometime, her father had come and called her as it was time to return home and, therefore, she had to leave the place where she was playing badminton with the deceased. What is asserted by the witness is that at that time, the appellant had started playing badminton with the deceased and, thereafter, she had gone home and on the next day, learnt that the deceased was missing. This witness has been cross-examined by the defence at length but nothing could be brought on record to impeach her credibility. It could not be pointed out by the defence that she was on inimical terms with the appellant and was, therefore, stating false facts involving the appellant. The suggestion made by the defence that she had not seen the appellant playing badminton with the deceased is emphatically denied by her. On re-appreciation of evidence of witness Darshanaben, this Court is of the firm opinion that the fact that on December 17, 1999, between 8.45 PM and 9.00 PM, the appellant was found all alone playing with the badminton stands amply proved.

Similarly, witness Shankarbhai, who is examined at Exh. 81, has stated in his testimony before the Court that at the time of incident, he was residing in a building belonging to one Vinodbhai, which was situated in Padaria Mohalla of Village Adajan. According to him, at that time, his sister was staying with him. What is mentioned by this witness is that, he was employed as an operator in STD PCO Booth, which was located on the Ground Floor of Sanudip Apartment. The witness has mentioned that the owner of STD PCO was Nareshbhai i.e. the complainant. It is further stated by the witness that his duty hours were from 8.00 in the morning to 1.00 in the noon and from 2.00 PM to 11.00 PM. According to him, the incident in question had taken place on December 17, 1999 and he was discharging duties at STD PCO Booth upto 11.00 PM. What is mentioned by the witness is that he had found that the deceased and nephew of the complainant Nareshbhai i.e. Darshanaben were playing badminton opposite his shop and that Mrs. Dhanuben, who is mother of complainant Nareshbhai had called Darshanaben for dinner after which the deceased was playing badminton with Jayanti Kaka. It is further mentioned by the witness that after taking dinner,

Darshanaben had returned and started playing badminton with the deceased and, thereafter, Jayanti Kaka had returned to his apartment. It is further mentioned by him that thereafter, the parents of Darshanaben had come and called her to take her to their house after which the appellant, who was discharging duties as Watchman of Sanudip Apartment, had started playing badminton with the deceased. It is mentioned by the witness that when he was present in STD PCO Booth, the deceased had entered the shop and kept racket in the shop itself and left the place after drinking water and that he had left the STD PCO Booth at 11.00 PM and returned home. The witness has stated that about 11.30 PM, the nephew of complainant Nareshbhai i.e. Hiral had come to his house and inquired about the deceased and he had informed Hiral that the deceased had not come to his house. This witness is also cross-examined at length by the defence. In his cross-examination, the witness has asserted that he had last seen the victim at 9.00 PM when she had come to leave the racket in the STD PCO Booth. A strange suggestion was made to the witness by the defence that he had colluded with the real culprits and, therefore, he was falsely deposing against the appellant. However, who were the real culprits, could not be specified by the defence.

The suggestion which was made by the defence that he was falsely deposing against the appellant was emphatically denied by him. It could not be pointed out by the defence that this witness was also on inimical terms with the appellant and was out to implicate the appellant falsely in such a serious case. On re-evaluation of the testimony of witness Darshanaben and witness Sandipkumar, this Court finds that evidence tendered by them establishes conclusively that between 8.45 PM and 9.00 PM on December 17, 1999, the appellant alone was found playing badminton with the deceased at Sanudip Apartment.

(vi) The sixth circumstance which is sought to be relied upon by the prosecution is that on December 19, 1999, at about 10.30 PM, the parents of the victim returned home and found that the deceased was missing and hence, they made frantic efforts to trace her and as those efforts did not yield any result, a complaint was lodged at 2.30 AM on December 18, 1999 with Rander Police Station, informing that the deceased was missing. This circumstance stands amply proved by the testimony of complainant Nareshbhai, which is recorded at Exh.22. This fact also stands proved by the testimony of witness Ramdas Barko Borde, whose testimony is recorded at Exh.

94. Head Constable Borde stands completely corroborated by documentary evidence on record, namely, complaint lodged by Nareshbhai, informing the police that his daughter was missing which is produced at Exh. 95. Thus, the circumstance that on December 17, 1999, when the parents of the deceased returned home, they found the deceased missing is fully established by the prosecution.

(vii) The seventh circumstance which is sought to be relied upon by the prosecution is that between 9.00 PM and 9.30 PM on December 17, 1999, witness Vishnubhai Bahadur had seen the appellant taking the deceased on his cycle near Adajan Patia, Surat. To prove this circumstance, the prosecution has heavily relied upon the testimony of witness Vishnubhai, which is recorded at Exh. 89. Witness Vishnubhai Bahadur Nar Bahadur Pariyar has stated in his testimony before the Court that he is a member of Armed Forces of Nepal and that he had returned to his native place Nepal from Surat after the incident had taken place. According to him, before 1-1/2 year of the incident, he was residing in godown portion of the apartment, known as Sanudip Complex, which is situated in Adajan area of Surat. The witness has mentioned that on the relevant date, he was preparing Chinese food items

and selling the same near Adajan Patia. According to him, he was knowing the appellant, who was discharging duties as a Watchman of Sanudip Complex. What is mentioned by the witness is that thereafter, he had shifted his residence and started residing in a room located in Housing Board near Palanpur Patia. The witness has explained that before 20 to 25 days of the day of incident, he was residing in a building of Housing Board, which is located near Palanpur Patia and was maintaining himself by selling Chinese food in a *larry*, which he was keeping near cross-roads of Adajan. The witness has further stated that he is knowing the residents of Sanudip Apartment and is also knowing the complainant i.e. Nareshbhai Patel. According to him, the incident had taken place in the year 1999 during winter season. The witness has mentioned that on the day of incident, he was at his *larry* which was kept near Adajan Patia cross-roads between 9.00 PM and 9.30 PM and he had seen the appellant going on a cycle whereas the deceased was sitting on the carrier of the cycle. The witness has mentioned that he had waived at the appellant and attempted to call the appellant near him, but the appellant after raising his hand had proceeded further and had not stopped. The witness has also stated that he

had called the appellant by his name, but the appellant had not come near him and had gone towards *Jakat-Naka* Road. According to this witness, at about 11.00 PM, he had closed his business and gone home. The witness has stated that on the next day, he had visited Sanudip Apartment to meet his friend Shankarbhai and found that a crowd had gathered near the apartment. The witness has asserted that he had made enquiry as to why people had gathered and thereupon, he was informed by Shankarbhai that the victim was missing since yesterday. What is asserted by the witness is that thereupon he had informed Shankarbhai that he had seen the appellant taking the victim on his cycle. The record shows that this witness had specially come from Nepal to tender evidence before the Court relating to the incident in question. The witness was subjected to gruelling cross-examination by the defence. In his cross-examination, the witness has stated that there was roof on his *larry* and he was able to see the appellant with the victim on his cycle because he was standing on the rear side of the *larry* and at that time, no customer had come to purchase the food items being sold by him. The witness also mentioned in his cross-examination that he had not mentioned the fact to anyone that he had seen the appellant going on cycle with

the victim. The suggestion made by the defence that he had not seen the appellant going on a cycle with the victim is emphatically denied by him. The further suggestion made by the defence that he had colluded with the complainant and was, therefore, deposing false facts to implicate the appellant is also emphatically denied by him. On reappraisal of the evidence tendered by this witness, this Court finds that it could not be even remotely suggested by the defence that he was on inimical terms with the appellant. The witness has tendered the evidence in most natural manner without making noticeable improvements and / or embellishments. No major omissions and / or contradictions could be brought on record by the defence with reference to his earlier police statement. Except making substanceless suggestion that he had colluded with the complainant and, therefore, was implicating the appellant falsely, no evidence could be produced on record to establish that he was either interested in the complainant or in the deceased and was, therefore, deposing falsely against the appellant. The testimony of witness Vishnubhai has inspired confidence of the learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses and in absence of any infirmities, this Court has no reason to

disbelieve the claim advanced by witness Vishnubhai that on the date of incident he had seen the appellant going on cycle with the victim between 9.00 PM and 9.30 PM. Incidentally, it may be mentioned that the testimony of witness Shankarbhai, who was serving in STD PCO Booth belonging to the complainant, shows that he had seen the victim and the appellant at Sanudip Apartment upto 9.00 PM playing badminton. Therefore, the time mentioned by witness Vishnubhai matches with the time stated by witness Shankarbhai. On review of evidence of this witness, this Court is of the opinion that it inspires confidence and deserves to be accepted.

The plea that recollection about the victim in the company of the witness Vishnubhai was not natural and, therefore, should be disbelieved, has no substance. If a Criminal Court is to view the testimony of the witness as unnatural, it would be easy to brush it aside with stereotyped reasoning that he had no cause to remember having seen the man with the girl accompanying him. Such a reasoning overlooks a broad aspect that a human mind, on hearing about any shocking incident, would have the tendency to recollect any previous event which could have had a connection with that incident. If, as a

matter of fact, the witness had seen that the appellant was going on a cycle with the girl of the age of the victim on the day of the gruesome episode, as happened in this case, there is nothing improbable in witness Vishnubhai remembering that the appellant was seen in the company of the girl. The conduct of witness Vishnubhai in not informing others cannot be considered as unnatural conduct at all. At the time when witness Vishnubhai had seen the victim with the appellant, he had not even inkling that the appellant was taking the victim with a sinister design of raping and killing her. There was no occasion for witness Vishnubhai to inform either the parents of the victim or police that he had seen the victim in the company of the appellant. In effect, either witness Vishnubhai concocted the story falsely or what he said must be true. No reason is suggested for witness Vishnubhai to bother himself to concoct such a canard. There is no manner of doubt that the victim was abducted by somebody and that the person who had abducted her had taken her to secluded place and murdered her after committing rape on her. Unless it is suggested that another person was involved in commission of offences, there is no rationale in the reasoning that there is an inherent incredibility in the version narrated by witness

Vishnubhai that the appellant had taken the girl with him. Thus, the testimony of witness Vishnubhai deserves to be accepted.

The claim made by Vishnubhai that on the next day i.e. on December 18, 1999, he had visited Sanudip Apartment to meet his friend Shankarbhai and told Shankarbhai that he had seen the appellant going on a cycle with the victim on the previous night gets complete corroboration from testimony of witness Shankarbhai Shivprasad Mainali, who is examined by the prosecution at Exh. 32. Witness Shankarbhai Mainali has also stated that witness Vishnubhai had visited Sanudip Apartment on December 18, 1999 and on seeing a crowd having gathered there, had asked him as to why the crowd had gathered. According to witness Shankarbhai, thereupon, he had informed witness Vishnubhai that the victim was missing and, therefore, the crowd had gathered. Witness Shankarbhai has asserted before the Court that thereupon, witness Vishnubhai had informed him that he had seen previous night the appellant going on cycle with the deceased, who was sitting on a carrier of the cycle. The testimony of witness Shankarbhai could not be demonstrated to be false or suffering from any infirmity.

No major omissions and / or embellishments could be pointed out. Thus, reliable testimony of witness Shankarbhai also lends corroboration to the testimony of Vishnubhai, who had claimed that he had seen the appellant going on a cycle with the deceased between 9.00 PM and 9.30 PM on December 17, 1999. Further, the testimony of witness Vishnubhai also gets ample corroboration from the evidence of witness Bipinbhai Babubhai Bhandari, who is examined at Exh. 31. This witness has also stated that his old servant Vishnubhai had approached him on December 17, 1999 and in his presence, had asked as to why people had gathered and thereupon, the people gathered had informed Vishnubhai that daughter of Nareshbhai was missing whereupon Vishnubhai had informed that the previous night, when he was present at his *larry*, he had seen the appellant going on a cycle and on the carrier of cycle, the victim was sitting and that though he had called the appellant by his name, he had not stopped and driven the cycle towards *Jakat-Naka*. This assertion made by Bipinbhai is also not effectively challenged by defence in his lengthy cross-examination. It may be stated that this and other witnesses have been examined by the prosecution also to prove the extra-judicial confession made by the appellant

before them, but the assertion made by this witness that witness Vishnubhai had informed him and others that on previous night, he had seen the appellant going on a cycle with the deceased could not be demonstrated to be untrue. This witness has also no cause to grind axe against the appellant and would not falsely implicate the appellant in such a serious case. Therefore, his assertion that he was informed by Vishnubhai that Vishnubhai had seen the appellant going on a cycle with the deceased deserves acceptance. Further, the testimony of Vishnubhai also gets corroboration from evidence of witness Arvindbhai Jagjivandas Patel, who is examined at Exh. 36. Witness Arvindbhai has also stated in his evidence that when he and others were making frantic effort to search the deceased and were standing near Sanudip Apartment, witness Vishnubhai, who was former servant of his friend Bipinbhai Bhandari had come and informed those who were present that at about 9.00 PM or 9.15 PM, he had seen the appellant going on a cycle towards *Jakat-Naka* and the victim was sitting on the carrier. In cross-examination, this witness has stated that first of all, Vishnubhai had narrated the fact that he had seen the appellant going with the victim on a cycle to witness Shankarbhai, who in turn had informed

Bipinbhai and at that time, they all were present. A fair reading of testimony of witness Arvindbhai makes it very clear that witness Vishnubhai had narrated to Shankarbhai and others that he had seen the appellant going on a cycle on December 17, 1999 between 9.00 PM and 9.30 PM and that he had found that the victim was sitting on the carrier of the cycle.

The above discussion makes it very clear that the testimony of witness Vishnubhai is reliable and trustworthy. As observed earlier, no major contradictions and / or omissions could be brought on record by the defence with reference to his earlier Police Statement and, therefore, there is no reason at all for discarding evidence tendered by him. Once the evidence of witness Vishnubhai is relied upon, it becomes evident that the incriminating circumstance, namely, that the deceased was last seen in the company of the appellant, who was going towards *Jakat-Naka* on his cycle, stands firmly and satisfactorily established by the prosecution. Once the prosecution proves satisfactorily that the deceased was last seen alive in the company of the appellant, there is no manner of doubt that, in view of provisions of Section 106 of the Evidence Act, the

burden was on the appellant to explain how and under what circumstances the deceased suffered the rape and the death. It is noticed by the Court that the appellant has not explained at all as how the deceased suffered the rape and the death.

(viii) Yet another circumstance, which is sought to be relied upon by the prosecution is that after Vishnubhai had disclosed before witness Shankarbhai and others that he had seen the appellant going on a cycle towards *Jakat-Naka* with the deceased a search was made about the appellant and the appellant was found missing. To prove this circumstance, the prosecution has relied upon the testimony of complainant Nareshbhai, examined at Exh. 22, who has stated in his testimony that after information was conveyed by witness Vishnubhai to him and others that he had seen the appellant taking the deceased on cycle towards *Jakat-Naka*, a search was made for the appellant, but the appellant was not to be found at all and was missing. This fact is also stated by witness Bipinbhai, who is examined by the prosecution at Exh. 31. Further, this fact is also deposed to by witness Arvindbhai, who is examined by the prosecution at Exh. 36, and also by witness Hiralkumar Bipinbhai Patel, who is examined by

the prosecution at Exh. 72. It is well to remember that the appellant was employed as a Watchman of Sanudip Apartment and, therefore, normally, the appellant would be found performing his duties at Sanudip Apartment, but all those who had collected at Sanudip Apartment had not found the appellant present at all at the apartment. The appellant was residing just opposite Sanudip Apartment, but he was also not present at his residence with his wife and children. The appellant could not offer any explanation to the Court as to where he was from December 18, 1999 to December 19, 1999 till he was brought to Sanudip Apartment by witness Chandravadan, who is examined by the prosecution at Exh.30. This is also an incriminating circumstance which will have to be taken into consideration while weighing circumstantial evidence against the appellant.

(ix) The next circumstance which is sought to the relied upon by the prosecution is that in the morning of December 1999, witness Chandravadan, who was going home, had seen the accused sitting at an open place near Bhulka Bhavan School and had approached the appellant and on enquiry being made, the appellant had made extra-judicial confession before him at that time. To prove this

circumstance, the prosecution has heavily relied upon the testimony of witness Chandravadan, which is recorded at Exh. 30. The witness in his testimony before the Court has explained that at the time of incident, he was residing in Anand Mangal Society, situated in Ramnagar area of Rander Surat and had, thereafter, shifted to Sandhyavadan Society, which is located near Palanpur *Jakat-Naka*. According to him, he is working with an institution known as “Saral Enterprises”. The witness has stated that the incident had taken place on December 17, 1999. The testimony of this witness shows that he is brother-in-law of Nareshbhai Thakorebhai. The witness has claimed that in the night of day of incident, witness Nareshbhai and his wife i.e witness Kailashben, had come to his house to enquire about their missing daughter. It is further stated by this witness that, thereafter, he had accompanied Nareshbhai to Nareshbhai's house and stayed their for the whole night. The witness has stated that thereafter in the morning, he was going on his motor-cycle to his house to take bath and found that the appellant, who was employed as Watchman of the society in which the complainant Nareshbhai was residing, was sitting in an open plot. The witness has stated that, therefore, in order to bring him to Sanudip Apartment, he

had gone near the appellant and asked the appellant as to where the deceased was. The witness has asserted that thereupon, the appellant had informed him that he had raped and killed her. The witness has stated that thereafter, he had taken the appellant to the house of the complainant where complainant and others had interrogated the appellant and before them also, the appellant had admitted that he had committed rape on the victim and killed her. The witness has further stated that thereafter, complainant Nareshbhai had called the police and after arrival of police, he had gone to his house to take bath. It may be stated that this witness was residing in altogether another society and had no dealing with the appellant. In fact, it is not suggested by the defence to this witness that he was on inimical terms with the appellant and was, therefore, out to implicate him falsely in such a serious case. This witness is cross-examined at length and in great detail, but nothing could be brought on record to impeach his credibility. The witness has narrated the incident in a straight-forward manner without making improvements and / or embellishments. The testimony of this witness makes it very clear that while going home, he had spotted the appellant and made enquiries about the missing girl

whereupon the appellant had admitted his guilt.

The witness stands amply corroborated by testimony of complainant Nareshbhai recorded at Exh. 22 wherein the complainant has stated that in the morning of December 19, 1999, the appellant was brought by witness Chandravadan Naginbhai Patel and on being interrogated, the appellant had made extra-judicial confession that he had raped the victim and killed her. The assertion made by witness Chandravadan that the appellant had made extra-judicial confession before him and others gets complete corroboration from the testimony of witness Bipinbhai Babubhai Bhandari, who is examined at Exh. 31. This witness in his testimony before the Court has stated that he is resident of Village Bhatha and running *larries* for selling Chinese food. According to him, one of his *larries* is parked at Adajan Patia near Mahan Terrace whereas another is being parked near Saint Park and third is being parked near Sagar Complex whereas he is having a shop on the Ground Floor of Sanudip Apartment. This witness has mentioned before the Court that he prepares Chinese food in this shop, which is located in Sanudip Apartment. According to him, on the night of December 17, 1999, when he was present in his house situated in

Village Bhatha, he had received telephone call from complainant Nareshbhai, who had asked him as to whether the victim had come to his house. The witness has mentioned that thereupon, he had asked Nareshbhai as to what had happened and thereupon, Nareshbhai had informed that the victim was missing since night of December 17, 1999. The witness has stated that on the next day, he had gone to Sanudip Apartment to attend to his shop and found that several persons had collected there. According to this witness, he had asked the persons collected there as to whether the missing girl was found and thereupon, they had said “No” to him. The witness has further stated that in the noon, one Vaishnav (i.e. witness Vishnu Bahadur), who was earlier employed by him, had come to Sanudip Apartment and asked as to why the people had gathered there and thereupon, Vishnubhai was informed that the daughter of the complainant Nareshbhai was missing and, therefore, the people had gathered there. The witness has stated that thereupon, Vishnubhai had informed all present that yesterday night, he had seen the appellant going with the victim on his cycle and that though he had called out name of the appellant, the appellant had not stopped. The witness has further stated that on the next day, witness Chandravadanbhai had

brought the appellant and on being interrogated, the appellant had informed that he had committed rape on the victim and killed her by throttling her neck and also causing injuries by knife. Though this witness has been cross-examined at length, it is relevant to notice the assertion made by the witness that the appellant had made extra-judicial confession is not challenged by the defence at all. Where the evidence of a witness is allowed to go unchallenged with regard to a particular point, it may safely be accepted as proved.

The claim of witness Chandravadan that the appellant had made extra-judicial confession before him and others when he had brought the appellant at Sanudip Apartment gets corroboration from the testimony of witness Arvindbhai, who is examined by the prosecution at Exh. 36. This witness has also asserted that witness Chandravadanbhai had approached the appellant, who was found sitting in an open place and that the appellant was brought to Sanudip Apartment by witness Chandravadanbhai. According to this witness, on being interrogated, the appellant had confessed before those persons who were present at Sanudip Apartment that after committing rape on the victim, he had killed her. It could not be

pointed out by the learned Counsel of the appellant that testimony of witness Arvindbhai suffers from any serious infirmity. Therefore, the same will have to be accepted and acted upon. It may be mentioned that to prove extra-judicial confession made by the appellant before witness Chandravadan as well as the complainant Nareshbhai and others, the prosecution had also examined witness Jagdishbhai Patel, who is brother of complainant Nareshbhai Patel, at Exh. 33. Initially, witness Jagdishbhai had not supported the prosecution case and was, therefore, declared hostile to the prosecution with the leave of the Court. However, in cross-examination by the learned Additional Public Prosecutor, witness Jagdishbhai has also asserted that extra-judicial confession, as referred to by others, was made by the appellant. The suggestion made by the defence that the appellant had not made extra-judicial confession before him is emphatically denied by this witness. It is settled law that evidence of a hostile witness can be relied upon, if it is corroborated by other evidence on record. The claim made by witness Jagdishbhai that the appellant had made extra-judicial confession before him and others gets complete corroboration from the evidence tendered by other witnesses examined in the case and,

therefore, deserves acceptance. Even if the testimony of hostile witness is discarded from consideration for the time being, on review of evidence adduced by the prosecution, this Court is of the firm opinion that the appellant had made extra-judicial confession before witness Chandravadan as well as complainant and others stating that he had committed rape on the victim and killed her.

The plea that extra-judicial confession being a weak piece of evidence should not be relied upon cannot be accepted. It is true that normally, the extra-judicial confession is regarded as a weak piece of evidence and would not be relied upon by the Court unless corroborated in material particulars. However, the extra-judicial confession referred to by the witness is firmly established by the reliable testimony. In fact, on December 18, 1999, the appellant was knowing fully well that his name was disclosed as the person involved in the commission of crime and was, therefore, found missing. The appellant was spotted by witness Chandravadan, who was going home to take bath from the house of the complainant. It was but natural for witness Chandravadan to ascertain from the appellant as to where

the deceased was and what had happened to the deceased and, therefore, the claim made by witness Chandravadan that thereupon, witness had admitted guilt deserves acceptance. The appellant was, thereafter, taken to the apartment where the complainant was residing and there, he was interrogated by complainant and others. Therefore, the claim made by the witnesses examined to prove extra-judicial confession of the appellant that on being interrogated, the appellant had admitted his guilt deserves acceptance.

The law on extra-judicial confession is explained by the Supreme Court in **Piara Singh and Others Vs. State of Punjab, AIR 1977 SC 2274** and **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48.** The Supreme Court has ruled that law does not require that the evidence of extra-judicial confession should in all cases be corroborated. What is explained by the Supreme Court is that where the extra-judicial confession is proved by an independent witness who was a responsible person and who bore no animus against the appellant, the same would justify acceptance. According to the Supreme Court, there is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be

relied upon unless corroborated by some other credible evidence. Explaining further, it is held that the Courts have considered the evidence of extra-judicial confession a weak piece of evidence but if the evidence about extra-judicial confession comes from the mouth of witness / witnesses, who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of a witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. Applying the test laid down by the Supreme Court in above quoted decisions to the facts of instant case, this Court finds that the evidence about extra-judicial confession has come from the mouth of witnesses who are responsible members of the society and not biased at all. It is not even remotely suggested that they were inimical to the appellant. In respect of witnesses, nothing is brought out which may tend to

indicate that they had motive for attributing an untruthful statement to the appellant. The words spoken to by the witnesses are clear, unambiguous and unmistakably convey that the accused is the perpetrator of crime and nothing is omitted by the witnesses which may militate against it. This Court has subjected the evidence of witnesses who have referred to extra-judicial confession made by the appellant to a rigorous test on the touchstone of credibility. The evidence of witnesses have passed such rigorous test. Therefore, extra-judicial confession referred to by the witnesses deserves to be accepted.

Even if one proceeds on the footing that extra-judicial confession is a weak piece of evidence and should not be acted upon by the Court unless corroborated in material particulars, this Court finds that there is ample corroboration available on record to the extra-judicial confession made by the appellant before the witnesses who have been examined to prove the same and that is in the form of the circumstances which this Court has held to have been proved. At the instance of the appellant, the place of incident was ascertained and dead body of the deceased was found. As noticed earlier, the

deceased was last seen in the company of the appellant. Further, the T-shirt put on by the appellant was found blood stained. Thus, there is ample corroboration available to the claim made by the witnesses who have been examined by the prosecution to prove extra-judicial confession made by the appellant and, therefore, the evidence regarding extra-judicial confession cannot be brushed aside on the ground that it lacks corroboration.

The plea that extra-judicial confession was hit by provisions of Section 25 of the Evidence Act and, therefore, should be ignored from consideration is totally devoid of merits. The assertion made by each and every witness examined to prove extra-judicial confession is that the appellant had made extra-judicial confession before them and at that time, the police was not present. This assertion of the witnesses could not be demonstrated to be untrue. The sequence of events is that first of all witness Chandravadan had spotted the appellant sitting in an open place from where he had brought the appellant to Sanudip Apartment after he had admitted his guilt before him. After the appellant was brought to Sanudip Apartment, he was interrogated by the complainant and others, who had collected at Sanudip Apartment and on

being interrogated, the appellant had admitted his guilt before them also. The evidence tendered by the complainant and others does not indicate that at that point of time, the police was present. All the witnesses have categorically stated that on being interrogated, the appellant had made extra-judicial confession before them. The record further shows that thereupon the complainant had called police who had also interrogated the appellant and the appellant had made confession when the police was present. Of course, the second extra-judicial confession made by the appellant would be hit by the provisions of Section 25 of the Evidence Act, 1872. However, the first extra-judicial confession made by the appellant before the complainant and others would not be hit by the provisions of Section 25 of the Evidence Act at all inasmuch as at that point of time, no Police Officer was present in Sanudip Apartment. The net result of above discussion is that it is satisfactorily and firmly proved by the prosecution that the appellant had made extra-judicial confession before witness Chandravadanbhai, witness Nareshbhai, witness Bipinbhai and witness Arvindbhai admitting that he had committed rape on the victim and killed her.

(x) Yet another circumstance which is sought to be proved by the prosecution is that on arrival of police at Sanudip Apartment, after being informed by complainant Nareshbhai, the appellant had shown the place of incident where the dead-body of the deceased was found lying. In order to prove this circumstance the prosecution has placed reliance on the testimony of complainant Nareshbhai. Witness Nareshbhai has asserted in his testimony that after hearing extra-judicial confession made by the appellant, he had telephoned the police and the police had arrived at Sanudip Apartment. The witness has further stated that on being interrogated, the appellant had shown the place where dead body of the deceased was lying. It is true that in the *panchnama* place of incident, it is mentioned that the place of incident was shown by the complainant. However, it is nobody's case that before the extra-judicial confession was made by the appellant before the complainant and others, the complainant was knowing the place of incident. If the complainant had known the place of the incident, he would have immediately reached the same, to see his dear daughter. In these circumstances, the assertion made by the complainant in his examination-in-chief that the appellant had taken him, others and police

to the place of incident deserves acceptance. Further, witness Bipinbhai Bhandari examined at Exh. 31 has stated in his examination-in-chief that after extra-judicial confession was made by the appellant, all had asked the appellant as to whether he would show the place where the deceased was lying and thereupon, the appellant had said “Yes” and taken to a place which was 1 KM away from *Jakat-Naka*. Again, witness Arvindbhai Jagjivandas Patel, examined at Exh. 36, has also mentioned in his testimony that the appellant had mentioned before him and others that he had thrown the dead body of the deceased in *Khetrali* near *Jakat-Naka* and thereafter, all had gone in the company of the appellant to the place mentioned by the appellant where dead body of the deceased was found lying. Again, Investigating Officer i.e. Mr. S.A. Desai in his testimony recorded at Exh. 119 has stated that the place of incident was shown by the appellant. Thus, the evidence on record satisfactorily establishes that the appellant had shown the place of incident where dead body of the deceased was found lying. If the appellant had not been connected with rape and murder of the deceased, he could not have known the place of incident nor could have pointed the same to the complainant and others.

As explained by the Supreme Court in **State of Maharashtra Vs. Suresh (2000) 1 SCC 471**, three possibilities are there when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by him. One is that he himself had committed offence at the place pointed out by him or had concealed the incriminating material. Second is that he might have seen somebody else committing offence at the place of incident or concealing the incriminating material and the third is that he might have been told by another person that offence was committed at the place pointed out by him or thing was concealed there. But if the accused declines to tell the Criminal Court that his knowledge about the concealment and / or place of incident was on account of one of the last two possibilities, the Criminal Court can presume that the accused had committed offence at the place shown by him and / or concealed the incriminating material. This is because the accused is the only person who can offer the explanation as to how else he came to know about the place of incident and / or concealment of incriminating material and if he chooses to refrain from telling the Court as to how he came to know of it, the presumption is a well justified course to be adopted by

the Criminal Court that the accused had committed offences at the place shown by him or that the concealment of incriminating material was made by him. The Supreme Court has explained that such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act. On re-appreciation of evidence led in this case, this Court finds that the appellant has not offered any explanation as to how he had come to know about the place of incident or that the dead body of the deceased was lying at the place mentioned by him. Therefore, well justified presumption, as explained by the Supreme Court, will have to be drawn and it will have to be held that pointing out of the place of incident and find of dead body of the deceased is an incriminating circumstance against the appellant.

(xi) The next circumstance which is sought to be proved by the prosecution against the appellant is that at the instance of the appellant, his cycle and school-bag of the deceased were recovered and the school-bag was found containing anklets and earrings belonging to the deceased. To prove this circumstance, the prosecution has relied upon the testimony of *panch* Ishwarlal

Kantibhai Patel, examined at Exh. 50 and Investigating Officer Mr. S. A. Desai, who is examined at Exh. 119. *Panch-witness* Ishwarbhai has stated in his testimony that on December 19, 1999, at about 4.00 PM, he was called by Rander Police Station and asked to act as *panch-witness*. The witness has mentioned that another person who was ready to act as *panch-witness* was one Saileshbhai. According to this witness, the appellant had shown willingness to point out something and, therefore, after preparing first part of the *panchnama*, he had left in the company of police and another *panch* with the accused to the place pointed out by the appellant. The witness has further stated that at the instance of the appellant, they had come to Sanudip Apartment and the appellant had pointed out a cycle lying there which was seized by the police. The witness has further stated that on the Ground Floor of the apartment, there was a room which was opened by the appellant himself and on entering into the room, a school-bag was found hanging. The witness has stated that the school-bag was opened, from where two silver anklets and two gold earrings were recovered. The witness has further stated that hook of one of the anklets was missing whereas another was found broken. This witness was also

cross-examined by the defence at length but nothing could be brought on record to impeach his credibility. The witness stands corroborated by contemporary document, namely, recovery *panchnama*, which was drawn by the police on December 19, 1999. This witness further stands corroborated by testimony of Investigating Officer Mr. Desai recorded at Exh. 119. The Investigating Officer has also stated that while in police custody, the appellant had shown willingness to point out certain incriminating articles and, therefore, *panch-witnesses* were called and that the appellant had led to the room situated on the Ground Floor of Sanudip Apartment which was opened by the appellant. The Investigating Officer has further stated that on opening the room, a school-bag was found hanging from which the anklets and earrings belonging to the deceased were found. It is relevant to notice that the mother of the victim i.e. Ms. Kailashben has identified those articles as belonging to the deceased. Thus, there is no manner of doubt that after committing rape and murder of the deceased, the appellant had removed ornaments worn by the deceased and committed offence punishable under Section 397 of the Indian Penal Code.

(xii) The next circumstances which is sought to be proved by the prosecution is that human blood was found from T-shirt of the appellant and no explanation was offered by the appellant as to how human blood was found on his T-shirt. The fact that after arrest, the clothes put on by the appellant were seized under a *panchnama* is not disputed before this Court. The testimony of Investigating Officer makes it more than clear that incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory. The report of the FSL is produced by the prosecution at Exh. 129. It unerringly establishes that the T-shirt which was put on by the appellant was stained with human blood. Though this incriminating circumstance was explained to the appellant while recording his further statement under Section 313 of the Code, the appellant could not offer any explanation as to how human blood was found on his T-shirt put on by him. This Court is aware of the fact that the Blood Group of the deceased was 'A' and the Blood Group found on the T-shirt of the appellant could not be determined. However, the fact remains that human blood was found on the T-shirt of the appellant. Find of human blood on the cloth put on by the accused, in a case based on circumstantial evidence,

has its own importance. This aspect has been explained by the Supreme Court in **Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853** wherein blood stains of human blood on weapon and clothes of the appellant were found. Blood Group of stains could not be determined. The argument which was advanced before the Supreme Court was that find of human blood on weapon and clothes of the appellant could not be determined and was, therefore, of no consequence. Rejecting the said argument, the Supreme Court has held that find of human blood on knife and clothes of accused is a corroborative piece of evidence and lends corroboration to other evidence on record. Therefore, this circumstance also will have to be taken into consideration by the Court while weighing circumstantial evidence gathered by the prosecution against the appellant.

The above discussion makes it very clear that each of the circumstances sought to be proved is clearly established by the prosecution. There is chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the appellant. The cumulative effect of the proved circumstances is such that they are only consistent with

the guilt of the appellant. It is well settled that falsity of defence plea can be used as an additional link in the chain of circumstances. As noticed earlier, the defence of the appellant in his written statement is that in order to save close relatives of the complainant, he is falsely implicated in the case. The appellant could not even name so-called close relatives, who were sought to be screened by the original complainant. The defence stands falsified if one looks to the evidence tendered by the prosecution which unerringly establishes that the appellant had kidnapped the victim with intent to force her to sexual intercourse and committed rape on her, after which she was murdered and robbed. Thus, falsity of defence plea will have to be regarded as an additional link in the chain of circumstances established against the appellant.

13. This Court notices that the Supreme Court in the cases of: (i) **Vasa Chandrashekar Vs. Ponna Sathyanarayana And Another, (2000) 6 SCC 286**; and (ii) **Geetha Vs. State of Karnataka, (2000) 10 SCC 72**, while explaining law relating to circumstantial evidence, has ruled, that when circumstances proved are put to the accused through his examination under Section 313 of the Code of Criminal Procedure and the accused merely denies the same, then

such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As noticed earlier, all the incriminating circumstances proved were put to the appellant, and in his further statement recorded under Section 313 of the Code, he has merely denied the same. Therefore, such denial on the part of the appellant and non-explanation about the suspicious circumstances in which the deceased had died will have to be treated as an additional link in the chain of circumstances to bring home the charge against the accused. The cumulative effect of above circumstances proved clearly establishes that in all human probability, acts of commission of kidnapping, rape, murder and robbery of the deceased was done by the appellant and appellant alone and none else. The circumstances proved establish guilt of the appellant beyond reasonable doubt. The conclusions drawn by this Court from proved facts are consistent only with the guilt of the appellant and are not consistent in any manner with his innocence.

14. On review of evidence on record, this Court finds that it is fully and satisfactorily established by the prosecution that on December 17, 1999, the appellant had enticed the minor victim out of the keeping of her

lawful guardian with intent to force her to illicit intercourse and after so enticing, had committed rape on her and not only thereafter murdered her, but also committed robbery of gold and silver ornaments belonging to the victim. Thus, commission of offences punishable under Sections 363, 366, 376, 302 and 397 is firmly established and, therefore, the same is hereby upheld.

15. This brings the Court to the question of sentence to be imposed upon the appellant for the offences for which he has been found guilty by this Court. This Court has given anxious consideration to the question of sentence keeping in view the changed legislative policy which is patent from Section 354(3) of the Code of Criminal Procedure, 1973. Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of the sexual pleasure. There cannot be anything more obscene than this. It is a crime against humanity. Many such cases are not even brought to light because of social stigma attached thereto. According to some surveys, there has been steep rise in the child rape cases. Children need special care and protection. In such cases, responsibility on the shoulders of the Courts is more onerous so as to provide proper legal protection to these

children. Their physical and mental immobility call for such protection. Children are the natural resource of our country. They are country's future and hope of tomorrow rests on them. In our country, a girl child has a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuses. These factors point towards a different approach required to be adopted.

Further, in recent years, the rising crime rate – particularly violent crime against women has made criminal sentencing by the Court a subject of concern. Today, there are admitted disparities. Some criminals get very harsh sentence while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging criminal and in the ultimate making, justice suffer by weakening the system's credibility. Though it is not attempted by the Supreme Court to lay down any cut and dried formula relating to imposition of sentence, but there is no manner of doubt that the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in absence of any specific

legislation, judges must consider variety of factors and after considering all those facts and taking an overall view of the situation, impose sentence which they consider to be appropriate. Aggravating factors cannot be ignored and similarly, mitigating circumstances have also to be taken into consideration. By and large, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Courts must not only keep in view the rights of the criminals, but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

15.1 In a catena of decisions, the Supreme Court has ruled that death sentence should be imposed in rarest of rare cases. In **Bachan Singh Vs. State of Punjab, (1980) 2 SCC 684** and **Machhi Singh Vs. State of Punjab, (1983) 3 SCC 470**, the guidelines, which are to be kept in view when considering the question whether the case belongs to

the rarest of rear category for awarding death sentence, are indicated. In **Machhi Singh's** case, it is observed as under:

> *"The following questions may be asked and answered as a test to determine the 'rarest of the rare' case in which death sentence can be inflicted:*
>
> *(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*
>
> *(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?*
>
> *The following guidelines which emerge from **Bachan Singh** case will have to be applied to the facts of each individual case where the question of imposition of death sentence arises:*
>
> *(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.*
>
> *(ii) Before opting for the death sentence the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.*
>
> *(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all*

the relevant circumstances.

(iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime in enormous in

proportion. For instance, when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare case, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

15.2 In **Dhananjoy Chatterjee @ Dhana Vs. State of W.B., (1994) 2 SCC 220**, the appellant was one of the Security Guards deputed to guard the building known as Anand Apartment by M/s. Security and Investigating Bureau. On March 2, 1999, the deceased, a young girl of 18 years of age, complained to her mother that the appellant had been teasing her on her way to and back from the school. She had made similar complaints to her mother previously also. On a complaint by the father of the deceased, the appellant was transferred and another Security Guard was posted in his place. The transfer was to take effect from March 5, 1990, but the appellant performed his duties as a Security Guard at Anand

Apartment between 6.00 AM and 2.00 PM on March 5, 1990. On that day, at about 5 PM, the deceased was all alone in her flat. The appellant met the Security Guard who was posted in his place and told him that he was going to the flat of the deceased for contacting his office over the telephone. The appellant used the lift to go to the said flat. At about 6.05 PM, the mother of the deceased returned from the temple. While going to her flat in the lift, she was told by Lift Operator that the appellant had gone to her flat in her absence to make a telephone call to his office. When the deceased's mother entered the flat along with some of her neighbours, she found her daughter lying on the floor. Her skirt and blouse had been pulled up and her private parts and breasts were visible. There were patches of blood near her head as well as on the floor. There was blood stains on her hands and vagina also. The deceased was unconscious at that time. Her mother tried to take her to a doctor, but she died meanwhile. The matter was reported to the police and search was made for the appellant by the police at different places but in vain. He was not traceable. It was only on May 12, 1990 that the appellant came to be arrested. During the search of the room where the deceased had allegedly raped and murdered, blood stained earth, a broken chain, a cream colour

button, the torn panty of the deceased and some other articles were seized. Pursuant to disclosure made by him under Section 27 of the Evidence Act a 'Richo' wrist-watch was recovered. Appellant also led to the recovery of his shirt and trouser wrapped in a newspaper from his house pursuant to a disclosure statement. From the report of Forensic Science Laboratory, it transpired that the cream colour button recovered from the place of occurrence was from the shirt which had been recovered at the instance of the appellant from his house after his arrest. The circumstances relied upon by the prosecution were: (1) motive of crime (2) absconding of the appellant (3) evidence relating to appellant's visit to the flat of the deceased (iv) recovery of a cream colour button and chain from the flat of the deceased and shirt and pant of the appellant from his house, and (5) recovery of stolen wrist-watch from the house of the appellant. The Trial Court found the appellant guilty and convicted him (i) for an offence under Section 302 IPC and sentenced him to death, (ii) for an offence under Section 376 IPC and sentenced him to imprisonment for life, and (iii) for the offence under Section 380 IPC, he was sentenced to undergo rigorous imprisonment for five years. The Criminal Appeal filed by the appellant was dismissed and the sentence of death was confirmed by the High Court.

The Supreme Court also dismissed the appeal and confirmed the death sentence. While upholding the death sentence, the Supreme Court has made following pertinent observations:

> *"The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years. The faith of the society by such a barbaric act of the guard, gets totally shaken and its cry for justice become loud and clear. The offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society. The savage nature of the crime has shocked our judicial conscience. There are no extenuating or mitigating circumstances whatsoever in the case. A real and abiding concern for the dignity of human life is required to be kept in mind by the courts while considering the confirmation of the sentence of death but a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl of 18 year, by the security guard certainly makes this case a "rarest of the rare" cases which calls for no punishment other than the capital punishment."*

The above quoted pertinent observations will have to be considered seriously because they are

applicable to the facts of instant case as the appellant was employed as Watchman of Sanudip Apartment. Instead of protecting the welfare of the inhabitants, the appellant subjected the victim to gratify his lust and thereafter, murdered her. Not only the appellant raped and murdered the victim, but also committed robbery. This makes the crime even more heinous. Medical evidence indicates that the appellant, who was a fully grown male, had savagely raped the victim, which is quite evident from the injuries mentioned in Column No. 15 of the post-mortem notes of the deceased produced by the prosecution at Exh. 9. Keeping in mind the medical evidence and the state in which the dead body of the deceased was found, it is obvious that a most heinous type of barbaric rape, murder and robbery was committed on a helpless and defenceless girl aged 10 years who was prosecuting studies in IVth Standard. Faith of society by such a barbaric act of the appellant, who was a guard, gets totally shaken and its cry for justice becomes loud and clear. The offences committed by the appellant were not only inhuman and barbaric but they were committed in a totally ruthless manner. This is an affront to the human dignity of the society. The overall nature of the crime will have to be regarded as having shocked the conscience of the society. The rape and murder of the deceased was

cold-blooded, pre-planned and brutal without any provocation. Therefore, this circumstance makes the case a “rarest of rare” cases which calls for no punishment other than capital punishment.

15.3 Again, in **Laxman Nayak Vs. State of Orissa, (1994) 3 SCC 381**, on the day of occurrence, the appellant along with mother and her 7 years old grand-daughter i.e. his niece of the appellant had gone to a neighbouring village to take part in a funeral ceremony. In the afternoon, when all the relatives assembled for the ceremony were busy in their observation of the ceremony, the appellant commanded the deceased, his seven years old niece, to accompany him back to their village and the deceased followed him in obedience to his command. Sometimes later the appellant alone reached his house where on being asked about the deceased by his elder brother, the father of the deceased, the appellant told him that the mother and the deceased were in the neighbouring village. The next day a search of the deceased was made and the searching party found the deceased lying in a lonely place in a jungle in revealing circumstances. After the occurrence the appellant absconded and could be apprehended only after about 14 months. The prosecution relied on the following

circumstances: (1) evidence of last seen together (2) misrepresentation and false representation of the appellant as to whereabouts of the deceased (3) evidence relating to the injuries on the deceased and (4) discovery and seizure of incriminating articles. The trial court relying on the circumstantial evidence found to be established against the appellant, convicted him for an offence under Section 376 as well as under Section 302 of the Penal Code and having regard to the peculiar facts and circumstances of the case found it to be rarest of the rare case and, therefore, sentenced him to death. The High Court confirmed the death sentence. The Supreme Court also confirmed the death sentence. While upholding the death sentence, following important observations have been made by the Supreme Court:

> *"The hard facts of the present case are that the appellant is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently, the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfill his lust. It*

appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

The Supreme Court has further made following pertinent observations in the said decision:

"The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of an innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently the sentence of death imposed upon the appellant for the offence under Section 302 must be confirmed."

15.4 Again in **Kamta Tiwari Vs. State of M.P., (1996) SCC 250**, the evidence on record clearly established that the appellant was close to the family of father of the deceased and the deceased and the siblings used to call him 'Uncle'. Obviously, her closeness with the appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father

and brother, and asked for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder – as the numerous injuries on her person testified; and the finale was the dumping of her dead body in a well. While upholding death sentence, the Supreme Court has observed as under:

> "When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" case where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

15.5 Further, in **State of U.P. Vs. Satish, (2005) 3 SCC 114**, the victim, who had not even seen six summers in her life lost her life on account of bestial acts of the respondent who raped her and thereafter murdered her. When the victim went out to school on August 16, 2001, her parents would have never thought in their wildest

dreams that she would not come back home and would fall victim to the barbaric and inhuman acts of the respondent. The Trial Court found that the circumstances highlighted by the prosecution were sufficient to fasten guilt on the accused. It, therefore, convicted him under Sections 363, 366, 376(2), 302 and 201 of the Indian Penal Code. The crime was held to be one falling under the rarest of rare category. Death sentence was imposed for the commission of offence under Section 302 IPC. Various custodial sentences and fines were also imposed for other offences. Since a death sentence was awarded, the matter was referred to the High Court for confirmation in terms of Section 366 of the Code. The respondent preferred an appeal before the High Court. Both the capital sentence reference and the criminal appeal were heard together. The High Court, by its impugned judgment, set aside the judgment of conviction holding that the case rested on circumstantial evidence and the circumstances highlighted by the prosecution did not inspire the confidence. Thereupon, the State of U.P. carried the matter before the Supreme Court. The Supreme Court came to the conclusion that circumstances sought to be proved by the prosecution were firmly established. The Supreme Court, therefore, convicted the respondent under Sections 363, 366, 376(2), 302 and 201 IPC.

Thereafter, the Supreme Court considered the question whether the case was fit for restoration of death sentence imposed by the Trial Court on the respondent. After considering earlier law, the Supreme Court restored the death sentence which was imposed on the respondent by the Trial Court. While restoring the death sentence, the Supreme Court has made following pertinent observations in paras 28 to 32 of the reported decision:

> *"28. The principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just deserts, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.*
>
> *29. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that*

are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.

30. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

31. Considering the view expressed by this Court in ***Bachan Singh*** *case and* ***Machhi Singh*** *case, we have no hesitation in holding that the case at hand falls in the rarest of rare category and death sentence awarded by the trial court was appropriate. The acquittal of the respondent - accused is clearly unsustainable and is set aside. In the ultimate result, the judgment of the High Court is set aside and that of the trial court is restored. The appeals are allowed."*

Applying the principles laid down by the Supreme Court in abovequoted decisions to the facts of this case, this Court finds that the crime committed by the appellant is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverse mind of a human being who has no

control over his carnal desires. In vain, this Court has searched for mitigating circumstance – but found aggravating circumstances aplenty. It is not the case of the appellant that offences were committed by him under the influence of extreme mental or emotional disturbance nor the age of the appellant can be regarded as too young for not imposing death sentence on him. It could not be even remotely suggested by the appellant to anyone that he had acted under the duress or domination of any other person. The appellant has not even made an attempt to show that he was mentally defective and that the said defect had impaired his capacity to appreciate criminality of his conduct.

16. Testing the case on the touchstone of the guidelines referred to in **Bachan Singh** and **Machhi Singh** *(supra)* as well as other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, this Court is of the firm opinion that the case will have to be appropriately called as one of the rarest of rare cases. Therefore, the death sentence imposed on the appellant by the Trial Court is hereby confirmed. Confirmation Case No. 4 of 2005 accordingly stands disposed of. The above discussion makes it clear that there is no substance in the appeal

filed by the appellant and, therefore, Criminal Appeal No. 1221 of 2005 filed by him is also dismissed. *Muddamal* be disposed of in terms of the directions given by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.] [H. B. ANTANI, J.]

/shamnath